

UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 31

SUMMIT CARE CALIFORNIA d/b/a  
ROYALWOOD CARE CENTER<sup>1/</sup>

Employer

and

Case No. 31-RC-7964

HEALTH CARE EMPLOYEES UNION, LOCAL 399,  
SERVICE EMPLOYEES INTERNATIONAL  
UNION, AFL-CIO, CLC<sup>2/</sup>

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.<sup>3/</sup>

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of the Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act <sup>4</sup>/:

**INCLUDED:** ALL FULL-TIME AND REGULAR PART-TIME LICENSED VOCATIONAL NURSES EMPLOYED AT THE EMPLOYER'S FACILITY LOCATED AT 22520 MAPLE AVENUE, TORRANCE, CALIFORNIA

**EXCLUDED:** ALL OTHER EMPLOYEES, GUARDS AND SUPERVISORS AS DEFINED IN THE ACT, AS AMENDED.

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by HEALTH CARE EMPLOYEES UNION, LOCAL 399, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC.

## LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that an election eligibility list, containing the **FULL** names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 31 within 7 days of the date of the Decision and Direction of Election. The list must be of sufficiently large type to be clearly legible. This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election, only after I shall have determined that an adequate showing of interest among the employees in the unit found appropriate has been established.

In order to be timely filed, such list must be received in the Regional Office, 11150 West Olympic Blvd., Suite 700, Los Angeles, California 90064-1824, on or before **March 12, 2001**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of 2 copies, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed the preliminary checking and the voting process itself, the names should be alphabetized (overall or by department, etc.).

## **RIGHT TO REQUEST REVIEW<sup>5</sup>/**

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by March 19, 2001.

**DATED** at Los Angeles, California this 5<sup>th</sup> day of March, 2001.

/s/ James J. McDermott  
James J. McDermott, Regional Director  
National Labor Relations Board  
Region 31

## **FOOTNOTES**

- 1/ The name of the Employer appears as corrected at the Hearing.
- 2/ The name of the Petitioner appears as corrected at the Hearing.
- 3/ The Employer, Summit Care California, d/b/a Royalwood Care Center, is a California corporation, with a place of business located in Torrance, California, where it is engaged in the operation of a skilled nursing facility. During the past 12 months, a representative period, the Employer derived gross revenue in excess of \$250,000. During this same period of time, the Employer purchased and received goods, supplies, and materials valued in excess of \$50,000 directly from enterprises located outside the State of California. Thus, the Employer satisfies the statutory jurisdictional requirement as well as the Board's discretionary standard for asserting jurisdiction herein. *East Oakland Community Health Alliance*, 218 NLRB 1270 (1975).
- 4/ The Petitioner seeks to represent a unit of licensed vocational nurses ("LVNs") at the Employer's skilled nursing facility in Torrance California. The Employer asserts that the unit is inappropriate because the LVNs are supervisors within the meaning of Section 2(11) of the Act.

The Employer operates a skilled nursing facility with about 110 beds. The Employer employs about 10 – 12 Registered Nurses ("RNs"), about 12 LVNs and about 24 certified nursing assistants ("CNAs"). The Employer also employs nursing assistants ("NAs") who are not certified. The LVNs are assigned to work at any given time as either a treatment nurse or a charge nurse. The charge nurses are often referred to as "patient care supervisors." There are three shifts of duty each day. There are two stations at the facility. On each shift, there are about three LVNs, eight to fourteen CNAs and NAs, and one or two RNs. There is an LVN at each station who is designated as the charge nurse. Each day, about 9 LVNs are assigned to work as charge nurses. About once or twice a month, an RN will serve as a charge nurse instead of an LVN. In addition, on each shift there are one or two RNs who are designated as patient care coor-

dinators. These RN patient care coordinators are sometimes referred to as RN supervisors. The RN patient care coordinators are responsible for the shift. They supervise the work of the LVNs and the CNAs. The RN patient care coordinators were described by the Director of Nursing as the "go-to person" when the Director of Nursing is not available.

The duties of the LVNs include distribution of medications, treatment of wounds, assessment of new patients and participation in the preparation of patient care plans for new patients. The LVNs who are assigned to work as a charge nurse on a shift do not receive any pay differential for doing so. The pay range for an LVN is \$14.50/hour - \$18.50/hour. The pay range for an RN is \$19.00/hour - \$26.00/hour and the pay range for a CNA is \$6.80/hour - \$9.00/hour.

Section 2(11) of the Act defines a statutory supervisor as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The criteria listed in Section 2(11) are to be read in the disjunctive so that the exercise of any one of the indicia listed in Section 2(11) may warrant a finding of supervisory status; however, Section 2(11) also contains the "conjunctive requirement that the power be exercised with 'independent judgment,' rather than in a 'routine' or 'clerical' fashion." *Chevron U.S.A.*, 309 NLRB 59, 61 (1992). The party attempting to exclude individuals from voting by alleging that they are statutory supervisors has the burden of establishing that they are supervisors within the meaning of Section 2(11) of the Act. *Ohio Masonic Home*, 295 NLRB 390, 393 (1989); *Golden Fan Inn*, 281 NLRB 226, 229-230 fn. 24 (1986); *Tuscon Gas & Electric Co.*, 241 NLRB 181 (1979).

There is no evidence that the LVNs have any authority to transfer, suspend, lay off, recall, promote, or discharge employees, or to effectively recommend the exercise of such authority. The Employer asserts that the LVNs are supervisors because they have the authority to assign and direct work, resolve grievances, evaluate employees, recommend raises, issue discipline, and, on occasion, effectively recommend hiring of employees.

### **ASSIGN**

In *Providence Hospital*, 320 NLRB 717, 727 (1996), the Board noted that the term “assign” in Section 2(11) refers to “the assignment of an employee’s hours or shift, the assignment of an employee to a department or other division, or overall job responsibilities. It would also include calling in an employee or reassigning the employee to a different unit.” The Board opined that it is unclear whether the statutory term “assignment” also includes ordering an employee to perform a specific task. In any event, the Board stated that the authority to “assign,” whether it be the assignment of employees or the assignment of tasks, must be done with independent judgment to constitute statutory supervisory authority.

In the instant case, the LVNs do not schedule employees or otherwise assign them to work particular shifts. The Director of Nursing makes the schedules for employees. Although a CNA may give a leave of absence request form to a charge nurse, it appears that the charge nurse merely forwards the request to the Director of Nursing or the Administrator for approval. There is no evidence that the LVN makes any effective recommendation with respect to the granting of the leave. LVNs acting as charge nurses may attempt to find a replacement for an absent employee, or find an additional employee if there is an increase in the patient population, by calling off-duty employees, or, if necessary, asking an employee whose shift is ending to stay and work extra. However, the charge nurses can not require that an employee report to work or stay at work when the employee is not scheduled to do so. In *Providence*, supra at 727, the Board

noted that asking, without authority to require, employees to report to work, is not necessarily the exercise of supervisory authority. In the instant case, I conclude that whatever limited authority the charge nurses have to attempt to find an additional or replacement employee or to ask another employee to work overtime, is not authority that requires the use of independent judgment within the meaning of Section 2(11) of the Act.

The Employer asserts that the LVNs assign CNAs to particular patients at the beginning of a shift. However, the record establishes that in order to ensure continuity for the patients, the CNAs are given permanent assignments to particular rooms. These permanent assignments are made by the Director of Nursing. Moreover, there is no evidence that the LVNs exercise the use of independent judgment in making assignments. The record fails to establish that the patients' needs or the nurses' skills differ significantly. In fact, as one of the LVNs who was called as a witness by the Employer testified, the CNAs all are equally capable. Therefore, I conclude that the limited role of LVNs as charge nurses in making assignments does not involve the independent judgment required of a supervisor. *Providence*, supra at 732; *Bozeman Deaconess Hospital*, 322 NLRB 1107 (1997).

### **DIRECTION**

The Employer asserts that the LVNs exercise supervisory authority in that they give direction to CNAs. The Board regularly distinguishes "supervisors who share management's power or have some relationship or identification with management from skilled nonsupervisory employees whose direction of other employees reflects their superior training, experience, or skills." *Providence Hospital* supra at 729. In the instant case, the record reveals that the CNAs generally know what tasks are required of them and perform them without much direction. The CNAs generally have the same daily routine, performing the same tasks within the same daily time frame. To the extent that the LVNs provide any direction to the CNAs, when acting as charge nurses or otherwise, such direction is merely



routine and does not involve the exercise of independent judgment. Rather, it is direction akin to the direction given by a lead or journey level employee to a less experienced employee or the direction given by an employee with specialized skills and training. Therefore, I conclude that the direction given by LVNs is routine and does not require the exercise of independent judgment necessary to establish statutory supervisory authority.

### **RESOLVING GRIEVANCES**

The Employer asserts that the LVNs possess the authority to resolve grievances of employees. Apparently, on rare occasions, an LVN may adjust the assignment of a CNA who is concerned that she has too many heavy patients or has more patients assigned to her than other CNAs. I do not find that the LVNs exercise independent judgment on the rare occasions that problems such as these occur. The fact that LVNs may resolve minor employee complaints regarding workload or personality conflicts is insufficient to establish supervisory status. *Ohio Masonic*, 295 NLRB 390, 394 (1989). The Board has noted that balancing work assignments among staff members does not require the exercise of supervisory independent judgment. *Providence Hospital*, supra at 732. Therefore, the record fails to establish specific incidents where LVNs have exercised independent judgment in resolving grievances.

### **EVALUATE AND REWARD**

In support of its assertion that LVNs are supervisors, the Employer notes that LVNs may be asked to evaluate employees. Although the record does contain evidence of evaluations of employees completed by LVNs, not all of the LVNs are asked to do evaluations. The evaluations of CNAs completed by LVNs are reviewed by the Director of Nursing.

Section 2(11) does not include "evaluate" as an indicia of supervisory authority. Therefore, as the Board recently confirmed in *Harborside Healthcare*, 330 NLRB No. 191 (April 24, 2000), "when an evaluation does not, by itself, affect the

wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor.” The authority to evaluate employees without more is insufficient to establish supervisory status. *Passavant Health Center*, 284 NLRB 887, 891 (1987).

The record is devoid of evidence that any employee’s job status has been affected by an evaluation by an LVN. The evidence fails to establish that there is a direct link between the evaluations made by LVNs and pay increases. Significantly, the LVNs make no recommendation on their evaluations of CNAs that the CNA receive any wage increase. Moreover, there is no evidence that the evaluations carry recommendations for any specific personnel action. The role of the LVNs in evaluating employees is similar to that of more experienced lead employees, who merely provide their opinions on the abilities of employees that they evaluate. See *Harborside Healthcare*, *supra*, slip opinion at page 2 and cases cited therein.

The Employer asserts that the LVNs can recommend that a CNA receive a raise. Although an LVN may recommend that a CNA receive a raise, the record fails to establish that any such recommendation would be relied upon, without an independent evaluation by others, in granting the raise. In fact, to the contrary, the Director of Nursing testified that in granting raises the Employer considers a number of factors, including the employee’s record of absences and tardies, family and resident complaints and complaints from other staff members. According to the Director of Nursing, when an LVN does recommend that an employee receive a raise, the Director of Nursing discusses the matter with the administrator. It is the administrator, or his boss, who determines whether a raise is appropriate. Clearly, the LVNs can not grant a raise. Nor can they effectively recommend a raise.

#### **DISCIPLINE:**

The Employer maintains a disciplinary system whereby employees are given undocumented verbal counselings, written verbal warnings (also called written

coachings), and/or written warnings. The employees can also receive either a suspension or a termination. The charge nurses can give verbal and written coachings and can issue written warnings. If the discipline involves a written documentation, the Director of Nursing or, at least, the RN patient care coordinator is involved. The Director of Nursing always follows up with the "follow up coaching" of the employee.

According to the Employer's Chairman of the Board, if there is a problem with a CNA, the charge nurse would talk to the employee and tell the RN patient care coordinator about the incident. If a written warning is necessary, there would be a meeting with the employee, at which the RN patient care coordinator and/or the Director of Nursing would be present.

One of the LVNs called by the Employer to testify testified that she had never had occasion to use a disciplinary notice. In fact, she seldom had occasion to even counsel a CNA. She testified that if she had a problem, she would inform the RN patient care coordinator about the problem.

The Board has stated that "for the issuance of reprimands or warnings to constitute statutory supervisory authority, the warning must not only initiate, or be considered in determining future disciplinary action, but also it must be the basis of later personnel action without independent investigation or review by other supervisors." In contrast to the case of *Concourse Village*, 276 NLRB 12 (1985), a case cited by the Employer, the Employer herein does not maintain a disciplinary system whereby a pre-determined number of warnings automatically results in termination. In *Concourse Village*, the receipt of three warnings by an employee results in his or her termination. Therefore, Board in *Concourse Village* found that the warnings had a definite and sever effect on employment status. Similarly, in *Heartland of Beckley*, 328 NLRB No. 156 (1999), another case cited by the Employer, the employer therein has a defined progressive disciplinary system which explicitly provides for the number of warnings permitted before termination in each of three categories of misconduct. The

employees found to be supervisors in that case have complete independent discretion to determine whether to issue discipline and in which category to classify the misconduct.

The record herein does not establish that the coachings or warnings issued by LVNs automatically lead to any further discipline or adverse action against an employee. As the Board noted in *Ohio Masonic Home*, 295 NLRB 390, 394 (1989), the mere reporting of oral reprimands and the issuing of written warnings that do not automatically affect job status or tenure does not constitute supervisory authority. Therefore, I conclude that the record fails to establish that the LVNs possess Section 2(11) supervisory disciplinary authority.

Although an LVN acting as a charge nurse could send an employee home for insubordination, it is clear that this rarely happens. The Director of Nursing testified about only one incident during which an LVN sent home a CNA who was being insubordinate. That incident occurred three years ago and in that case the Director of Nursing called the RN patient care coordinator to discuss the situation. In addition, an LVN testified that she has sent CNAs home early about three or four times. She described an example where an employee became too sick to work with patients, an example where an employee received a call that her son was ill, and an example where an employee said he or she would rather go home than work with a particular patient. On each of these occasions, the LVN informed the RN patient care coordinator about what happened. I do not find these isolated incidents, which don't involve the use of independent judgment, to be sufficient to render LVNs statutory supervisors.

## **HIRING**

In support of its argument that the LVNs effectively recommend hiring, the Employer cites to the testimony of Director of Nursing that once or twice within the last three years an LVN has recommended that a particular CNA be hired. The Director of Nursing was only able to recall the specifics of one instance, in which a long time ago an LVN recommended that a CNA with whom she had

previously worked be hired and the Employer took her recommendation into consideration. In addition, the Employer cites to the testimony of an LVN that over the last 16 years, she has recommended about two or three times that a particular CNA be hired. There is no evidence that the Employer would be prepared to implement recommendations of LVNs to hire employees without an independent investigation or evaluation. Clearly, this evidence is insufficient to establish that LVNs can effectively recommend the hiring of employees. The isolated and minimal involvement of LVNs in the hiring process does not render LVNs to be statutory supervisors. *First Western Bldg. Services*, 309 NLRB 591, 600 (1992).

In light of the foregoing, and the record as a whole, I conclude that the Employer has failed to establish that the LVNs are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I find that the petitioned-for unit is appropriate.

There are approximately 12 employees in the unit.

- 5/ In accordance with Section 102.67 of the Board's Rules and Regulations, as amended all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

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